United Parcel Service, Inc. *and* Teamsters Local 177.
Case 22–CA–27863

October 28, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On June 20, 2008, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs. The Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that, under *Collyer Insulated Wire*, 192 NLRB 837 (1971), deferral is inappropriate in this case, we do not rely on *Stevens Graphics, Inc.,* 339 NLRB 457, 461 (2003). In that case, there were no exceptions to the judge's rejection of the employer's deferral argument. In addition, we do not rely on the judge's finding that deferral is inappropriate because this case presents "claims of employer animosity to the employee exercise of rights which are protected under the Act."

In finding that the Respondent violated Sec. 8(a)(3) and (1) by its refusal, because of Shop Steward Chris Eltzholtz' protected conduct, to rescind the warning letter for insubordination issued to employee Ernest Griffin, the judge properly distinguished *Onyx Environmental Services, LLC*, 336 NLRB 902 (2001), on its facts. We also note that there were no exceptions in that case to the judge's conclusion that the suspension and discharge of an employee in response to the employee's inappropriate and threatening conduct was not unlawful.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by telling Griffin that it was refusing to rescind his warning letter for insubordination because of Eltzholtz' protected conduct, Chairman Schaumber notes that the Respondent does not except to this finding apart from its contention that the General Counsel's witnesses should not be credited. Chairman Schaumber additionally does not rely on the judge's analysis under *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Parcel Service, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. October 28, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Saulo Santiago, Esq., for the General Counsel.
Edward P. Lynch, Esq., (Day Pitney, LLP), of Morristown, New Jersey, for the Respondent.
Edward O'Hare, Esq. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon a charge filed on March 15, 2007 and an amended charge filed on July 31, 2007[1] by Teamsters Local 177 (the Union), in Case 22–CA–27863, a complaint and amended complaint were issued against United Parcel Service, Inc. (Respondent) on July 31 and November 28, respectively.

The complaint, as amended, alleges essentially that on or about February 9, the Respondent, by Tracy Celmer, violated Section 8(a)(1) of the Act by stating that a warning letter issued to employee Ernest Griffin would not be rescinded because of the protected conduct of his shop steward, and that Respondent further violated Section 8(a)(1) and (3) of the Act by refusing to rescind said warning letter.[2] The Respondent's answer denied the material allegations of the complaint and posed the affirmative defense that the matter should be deferred to the parties' grievance-arbitration process.

A hearing on the allegations of the complaint was held before me on February 5, 2008 in Newark, New Jersey.

[1] All dates herein refer to 2007 unless otherwise specified.

[2] On July 31, the Regional Director for Region 22 dismissed that portion of the charge alleging that Respondent had violated Sec. 8(a)(3) of the Act and issued complaint on the remaining allegation. As a result of the Union's appeal of the dismissal of the 8(a)(3) allegation, the Regional Director revoked his decision to dismiss that portion of the charge on October 29.

On the entire record,[3] and considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business at 493 County Avenue, Secaucus, New Jersey, is engaged in the transportation of packages and goods. During the past year, Respondent has derived gross revenues in excess of $50,000 from the transportation of packages and goods from the State of New Jersey directly to points outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent additionally admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union represents a unit of employees including drivers, sorters, loaders, porters, office clerical employees, mechanics and other classifications of employees employed by the Respondent. The most recent collective-bargaining agreement between the parties is effective from August 1, 2002 to July 31, 2008.

Respondent operates numerous package delivery centers including the one involved herein, the Hackensack Center located in the Meadowlands Building in Secaucus, New Jersey, which was also referred to in the record as the Secaucus facility. Approximately 43 package delivery drivers are employed in and from that facility.

Ernest Griffin is a package delivery driver assigned to the Hackensack Center who has worked for Respondent for 20 years. Celmer is the facility's business manager and Michael Matteo occupies the position of dispatch planning supervisor. Chris Eltzholtz has worked as a driver for Respondent for over 16 years and is the union shop steward for the facility. He has served in this capacity for approximately 10 years.

B. The Disciplinary Meetings

On February 9, Respondent held its daily pre-working communication (PWC) meeting with employees. This meeting typically consists of a short informative talk, presented by a supervisor, to discuss subjects such as safety, training and other matters of importance to the drivers. At that time, the names of employees with whom management wishes to meet are announced, and they are expected to report to the office after the meeting concludes. On that morning, Griffin was summoned and, accompanied by Shop Steward Eltzholtz, reported to Business Manager Celmer's office. Dispatch Planning Supervisor Matteo was also present.[4]

The purpose of the meeting was to discuss a delivery scan audit performed the prior day on Griffin's truck which indicated that he had failed to deliver a package to 14 Mill Street in Lodi, New Jersey.[5] Disciplinary meetings with package car drivers for such discrepancies are not uncommon, and Eltzholtz has, as shop steward, represented employees in connection with such issues on numerous occasions. The record also reflects that Griffin had been summoned to meetings to discuss similar infractions on four or five occasions.

Celmer told Griffin that he would be receiving a warning letter for the missed scan. Eltzholtz requested to see the delivery records. Celmer stated that six packages had been scanned for that location. At first, Eltzholtz found only four deliveries, but Griffin explained that he had missed two packages during his initial stop and that he had returned to that location later in the day.[6] After looking through the records, Eltzholtz found two additional delivery scans for 14 Mill Street and pointed that out to Celmer. She took the delivery records and began comparing the tracking numbers. According to Celmer, the six deliveries listed in the records failed to reflect the missing package, and Eltzholtz asked how she definitely knew it was on Griffin's truck.[7]

Griffin was protesting during this exchange, stating that he did his job; that there had been six packages and he had delivered all six. Celmer was on her computer, tracking the package numbers. Griffin and Eltzholtz were continuing to talk, and Griffin was continuing to insist that he had made all his deliveries. Then Celmer asked Griffin how did she know that he did not steal the package. According to both Eltzholtz and Griffin, Celmer made a direct accusation relating to Griffin's possible theft of the package.[8]

---

[3] To the extent a determination of the facts involved herein requires an assessment of the credibility of the witnesses, or findings of fact based upon competing versions of events, certain apparent or nonapparent conflicts in the evidence may not be specifically addressed herein. My findings are based upon a review of the entire record. I have additionally carefully observed the demeanor of the witnesses, including whether they testified in a forthright or evasive manner, and have also considered their apparent interests, the consistency and inconsistency of their testimony, and the corroboration or lack of it by other witnesses and events. I have additionally considered inherent probabilities and reasonable inferences drawn from the record as a whole. To the extent my credibility resolutions are not specifically discussed below, testimony in contradiction to my factual findings has been considered, but discredited.

[4] The office where the meeting was conducted is a small one, approximately 9 x 10 feet in size. There is a manager's desk and desk chair, and behind them a credenza with file cabinets and a computer. Against the front wall of the office are two side chairs, separated by a small table. On one side of the manager's desk, against the wall is another side chair and file cabinet.

[5] A scan audit is made of the packages on a driver's truck in the morning before deliveries are made for the day. The driver is then required to scan packages as they are delivered. When the driver returns at the end of the workday, the scan audit is compared to the delivery scans made by the driver, to ensure that packages have been delivered to the appropriate address.

[6] Page 14 of Griffin's delivery records showed four packages delivered to 14 Mill Street and page 7 of his records showed two more packages delivered to that address.

[7] According to Respondent, Griffin had improperly scanned one delivery twice.

[8] Eltzholtz has a practice of taking notes of disciplinary meetings and maintains such notes in a small booklet. Celmer acknowledged that Eltzholtz was taking notes on this occasion. Eltzholtz' contemporaneous notes read: "How does she know if he did not steal package." Both

Upon hearing Celmer's comments, Griffin stood up and stated that he was not a thief. He argued that in 20 years, he had never been accused of stealing. Griffin pulled various items from his pockets, said he had his "own stuff" and did not need anyone else's. According to Celmer, Griffin approached her desk and came to the side of her chair, turned to Matteo and protested that he (Matteo) knew him and that he did not steal.

Celmer told Griffin to step back and sit down; but he did not follow her directive and continued to remonstrate. Eltzholtz told him to take a seat as well. Eltzholtz turned to Matteo and said that what Celmer said was not right, and Matteo said that he didn't think Celmer had meant it the way she said it. Celmer again told Griffin to sit down. Griffin continued to insist that he had not stolen anything. At that point Celmer told Griffin that he would be receiving additional warning letters for poor attendance and insubordination and ended the meeting.[9]

According to Eltzholtz, he and Griffin then left the office. Eltzholtz was trying to calm Griffin down, and told him that he would contact the union office about the warning letters. A short while later, Celmer summoned the two men back to her office. Celmer entered the office first, and by the time Eltzholtz got there she was sitting at her desk. Griffin was still upset, and repeated the phrase, "I'm hot." As Eltzholtz walked through the door, he turned to Griffin, who was behind him, and said, "Ernie, I'd be hot too, if someone accused me of stealing." As Eltzholtz testified, Celmer then became angry and stated that she had been going to rescind the warning letter for insubordination but because he (referring to Eltzholtz) had "opened his mouth," Griffin would be receiving it. Eltzholtz' notes state: "Came back in & she was going to take the W/L away but I opened mouth."[10] In a similar vein, Griffin testified that Celmer said, "Well, I was going to take away the insubordination warning letter but your shop steward got you that one, too."

According to Celmer's account of the initial meeting Griffin did not sit down, but he did eventually step back. Feeling intimidated by his conduct in her small and crowded office, she exited first, walking past Griffin, and went onto the pedestrian walkway where one of the supervisors was standing. Griffin left the office after her, and went to the "belt" where his package car was parked and continued to rant in front of other employees who were working in the area. As Celmer testified: "[h]e was very loud and boisterous. He was grandstanding in front of other employees. And as soon as he had their full attention he continued in a more boisterous fashion." According to Celmer, she was about 50 feet away from Griffin and heard his comments. He was saying, "you come in here, you just try to do your job. You're just trying to work hard and you get accused of being a thief and being a liar." Celmer walked over to Griffin and told him he could not be out there behaving in that fashion and instructed him to return to her office. They returned to the office, and Eltzholtz and Matteo, who had been standing nearby, joined them.

As Celmer testified, as they were walking into the office, she asked Griffin if he wanted to sit down and discuss this professionally, and stated that she would be willing to take away the warning letter for insubordination. Griffin was rocking back and forth on his feet; seeming very agitated and told Celmer to "do what you got to do." He accused Celmer of calling him a liar and a thief. Celmer testified that Griffin did not calm down; nor did he sit down. Eltzholtz then addressed Griffin, stating that Celmer was calling him a liar and telling him that he was stealing, and that he would be upset too. Celmer told Eltzholtz that he needed to stop "egging him on." According to Celmer, Eltzholtz made some other comments, repeating that she could not call Griffin a liar and that he would act the same way. At this point Celmer stated that she would not rescind the warning letter. Celmer testified that it was not because of anything Eltzholtz had said, but because Griffin would not calm down. She denied telling Eltzholtz that her decision to issue the warning letter had anything to do with what he said.

According to Matteo, after Celmer ended the first meeting, he and Eltzholtz remained behind. He heard Griffin's voice, describing it as "animated," as he continued to protest that he did not steal, and he came to do a job. Celmer directed everyone to return to the office and Matteo entered and stood by Celmer's desk. According to Matteo, Griffin was still angry and continued to insist that he had delivered the packages, and had not stolen them. Celmer told Griffin that he needed to calm down and Eltzholtz said that he did not blame the guy, because you are accusing him of stealing. Eltzholtz added that he'd be mad too, if it were him. Matteo quotes Celmer as stating to Eltzholtz: "If you keep egging him on, I'm going to have to give him a warning letter for improper behavior."

After this meeting concluded both Griffin and Eltzholtz exited the office and went to their trucks, which were the only ones left in the dock. A few minutes later, Eltzholtz observed Celmer standing by Griffin's truck. Although he could see the two of them, he did not hear what was said. Griffin testified that during the exchange Celmer told him that his shop steward was getting him the warning letters. Later that evening Eltzholtz ran into Griffin at the facility and asked him what had occurred during the discussion with Celmer at the truck. Griffin told him that Celmer had repeated her earlier statement that he was getting the warning letter because of what Eltzholtz had said. Celmer denied walking out to Griffin's truck and further denied making any such comment to him.

Celmer and Matteo phrase Celmer's comments differently. According to Celmer she told him that this "creates a very big problem for our customers, for us as a company. And I asked him, you know, what happened to it, did the pre-loader take it, did it get lost somewhere in the building, did the customer take it, did he take it." I do not credit this version, as I find it unlikely that Celmer would be openly speculating about errors made by others in this meeting which ostensibly had been called to address a mistake and issue discipline to Griffin. In any event, as the testimony of all witnesses and subsequent events makes clear, Griffin interpreted Celmer's comments as an accusation of theft. In fact, under cross-examination, Celmer acknowledged that Griffin had been calm up to that point, and that both Griffin and Eltzholtz articulated to her that they understood Celmer to have accused Griffin of stealing. I further note that there is no evidence that Celmer did anything to dispel this notion during the course of events that ensued.

[9] It appears from the record that Griffin was not issued a warning letter for poor attendance.

[10] As discussed in further detail below, Eltzholtz' attribution of Celmer's words was not recorded using marks indicating that it was a direct quotation (". . ."). Respondent relies upon this point to challenge Eltzholtz' credibility and the veracity of this entry in his log.

On March 1, Griffin received two warning letters. One referred to "your unacceptable behavior on February 9, 2007 when you were insubordinate and wagged your finger toward the face of a Manager. This is unacceptable behavior." The second concerned "your failure to follow the proper delivery methods by not scanning a package for 14 Mill St. Lodi on February 9, 2007."

III. ANALYSIS AND CONCLUSIONS

A. The Deferral Issue

In its answer to the complaint, and again at hearing and in its posthearing brief, Respondent contends that the instant matter should be deferred to arbitration pursuant to the principles of *Collyer Insulated Wire Co.*, 192 NLRB 837(1971) and *United Technologies Corp*., 268 NLRB 557 (1984).

It appears from the record that Respondent and the Union have had a long bargaining history. Both the national master united parcel agreement (NMA) and the Local 177 Supplement, which apply to the circumstances herein, contain broad grievance and arbitration provisions. Article 4 of the NMA contemplates that the responsibilities of job stewards shall include: "The investigation and presentation of grievances with the Employer or the designated company representative in accordance with the provisions of the collective-bargaining agreement." In relevant part, article 4 also provides:

> Stewards and/or alternate stewards shall not be subject to discipline for performing any of the duties within the scope of their authority as defined in this section, in the manner permitted by this Section. Recognizing the importance of the role of the union steward in resolving problems or disputes between the Employer and its employees, the Employer reaffirms its commitment to the active involvement of union stewards in such processes in accordance with the terms of this article.

Further, article 4 makes clear that "[t]he Employer recognizes the employee's right to be given requested representation by a steward, or the designated alternate, at such time as the employee reasonably contemplates disciplinary action."

> In addition, Article 21, entitled "Union Activity," provides in pertinent part as follows:
>
> Any employee member of the Union acting in any official capacity whatsoever shall not be discriminated against for acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer's business, nor shall there be any discrimination against any employee because of union membership or activities. . .

Article 47 of the Local 177 Supplement, entitled "Discharge," specifically references warning letters:

> Section 1
>
> The following shall be causes for immediate suspension or discharge of an employee: drinking, or proven or admitted dishonesty.
>
> Section 2
>
> In all other cases involving the discharge or suspension of an employee, the Company will give three (3) working days' notice to the employee of their discharge or suspension and the reason therefore. Such notice shall be also given to the Shop Steward and the Local Union office. Any warning notice shall not remain in effect more than twelve (12) months.

On April 1, 2005, Respondent and the Union appeared before Arbitrator Carol Wittenberg to arbitrate a grievance brought under the collective-bargaining agreement concerning the Union's challenge to the Company's issuance of a warning letter to an employee on a matter unrelated to the instant proceeding. Of note to the instant case, however, was the issue presented to the arbitrator which was whether, under the collective-bargaining agreement, warning letters "standing alone" could be arbitrated, or whether they were subject to arbitration only when subsequent more severe discipline, i.e., suspension or discharge, was issued and based in part on progressive discipline stemming from the earlier warning letter. In that instance, the Union took the position that it was entitled to arbitrate the warning letter. The Employer argued to the contrary: that a warning letter standing alone was not arbitrable, and that, consistent with article 47, the only disciplinary matters which may be referred to arbitration are discharge and suspension.

In an opinion and award dated July 16, 2005, Arbitrator Wittenberg held that warning letters, standing alone, may not be arbitrated. In so concluding, the arbitrator looked to the language of the collective-bargaining agreement, the history and practice of the parties since at least 1990 and the Union's apparent agreement to the parties' rebuttal procedure,[11] which was found by the arbitrator to provide an adequate remedy should the employee in question be subject to more severe discipline.[12]

Respondent contends that the allegations of the complaint are covered by the foregoing contractual provisions and are subject to grievance and arbitration under the conditions adopted by the parties, as described by Arbitrator Wittenberg. Both the General Counsel and the Union argue, to the contrary, that the matter is not amenable to deferral.

It is well-settled that the Board has "considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." *Wonder Bread*, 343 NLRB 55, 55 (2004) (citations omitted). As the Board has held, deferral is appropriate when the following factors are present:

> [T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

Id. (citing *United Technologies Corp*., 268 NLRB 557, 558

[11] The Union and the Employer have agreed upon a procedure which allows an employee to "rebut" a warning letter, which in effect enables the Union to contest it at a later date should the employee suffer more severe progressive discipline.

[12] As the arbitrator stated: "Under the parties' procedure, a warning letter is either removed from the employee's file or can be arbitrated as part of a suspension or discharge case. In either case, the individual employee's rights are protected."

(1984))

In support of its argument that deferral is appropriate, Respondent argues that no claim of employer animosity to employee exercise of protected rights has been asserted in this case. Further, Respondent contends that: "UPS has expressed its willingness to arbitrate the issue of these letters as provided for in the collective bargaining agreement and as Arbitrator Wittenberg found—*once a subsequent disciplinary action has been taken*" (emphasis supplied). In support of its position, Respondent relies upon *August A. Busch & Co.* 309 NLRB 714, 716 (1992), where the Board found that while the contract at issue did not obligate either party to resort to the grievance and arbitration procedures, it was the availability of that machinery which triggered the deferral doctrine. In that case the Board determined that the dispute was cognizable by the grievance arbitration procedure and all other factors favoring deferral were present.[13]

In disagreement with the Respondent, I find that all the factors called for by *Collyer, United Technologies* and their progeny are not present here. In particular, I find that the relevant provisions of the parties' collective-bargaining agreement, as interpreted by the arbitrator (in apparent agreement with arguments advanced by Respondent), fail to provide a mechanism to resolve the underlying statutory issue and further fail to provide an appropriate remedy for the alleged violations.

The General Counsel argues, in its brief, that Article 21 of the NMA does not apply to Griffin insofar as this provision protects employees only insofar as they function as an officer of the Union. I do not agree with this assertion, and find that the second clause of article 21, which is a general nondiscrimination provision, arguably would cover Griffin in this instance. Nevertheless, I further conclude that the dispute is not amenable to resolution through the collective-bargaining process. In particular, Arbitrator Wittenberg has specifically ruled that "stand alone" warning letters are not arbitrable. Thus it would appear that the issue of whether Respondent's issuance of (or, as presented by the General Counsel, its failure to rescind) the warning letter stemmed from Griffin's insubordination or because of protected conduct cannot be considered under the collective-bargaining agreement. I note that Respondent does not take the position that this issue could or should be considered by the case in its present posture, but argues only that the warning letter could be arbitrated in conjunction with subsequent discipline, in the event any should be issued to Griffin.

In a variety of contexts, the Board has held that deferral is not appropriate where the issue involved is not arguably covered under the contract. See *Pepsi Cola Co*., 330 NLRB 474 (2000) (deferral not appropriate where arbitrator decided case on procedural grounds without consideration of the merits); see also *Stephens Graphics, Inc*., 339 NLRB 457, 461 (2003) (deferral of Section 8(a)(1) charge not appropriate where there was no specific contractual provision covering the dispute and there was no assurance that the alleged Section 7 rights were covered by the contract); *Western Massachusetts Electric Co*., 228 NLRB 607, 610 (1977), enf. denied on other grounds 573 F.2d 101 (1st Cir. 1978) (no deferral where arbitrator determined unilateral suspension of employee benefit not arbitrable).

Here, while the arbitrator found that the parties' agreed-upon procedure protected employee rights under the collective-bargaining agreement, this finding does not answer the question of whether employees' statutory rights are adequately protected by such a procedure. Because it appears, (and no party contests otherwise), that the issuance of the warning letter to Griffin would not be arbitrable under the contract, as interpreted by the arbitrator, such a factor strongly militates against deferral.

I further note that the Board has declined to defer in instances where an appropriate remedy cannot be fashioned through the arbitral forum. For example, in *Clarkson Industries*, 312 NLRB 349, 351 (1993), the Board considered whether alleged violations of Section 8(a)(1) and (3) should be deferred to arbitration. That case involved a warning issued to a shop steward and an alleged threat to hold that steward to a higher standard of conduct than that demanded of other employees. In that case, the shop steward was arguably covered by contract language prohibiting discrimination on the basis of union membership or activity. However, the arbitration provision provided that the arbitrator "shall not have the right or authority to subtract to or alter any provision of this Contract, nor may the arbitrator make any recommendations for future actions by the company or the Union." The Board found that this provision would prevent an arbitrator from imposing the functional equivalent of a "cease and desist" remedy, which is directed at future actions. The arbitrator would be, therefore, precluded from fashioning an appropriate remedy for the alleged threat and, as the Board held, deferral was not warranted. See also *Ramey Supermarkets*, 314 NLRB 9,10 (1994), where the Board affirmed the administrative law judge's refusal to defer a discharge case to arbitration under Collyer because the contract's grievance arbitration procedure limited back pay awards to 20 days.[14]

Similarly, in this instance, the contractual forum fails to offer a remedy which would be consistent with the purposes of the Act. To the contrary, it appears that an arbitrator would be precluded from issuing an award pertaining to the propriety of the warning letter issued to Griffin or to direct the Respondent to take any remedial action with regard thereto. In this regard, the Respondent's stated position that the warning letter may be arbitrated in the event it forms the basis for some future discipline offers nothing by way of remedy to any unfair labor practices which may be found herein.[15]

[13] That instance involved an 8(a)(5) refusal–to-bargain allegation. The Board specifically noted that there was no evidence or allegation of employer animosity toward the employees' exercise of protected rights. In that regard, the Board drew a distinction to the circumstances presented by *Kenosha Auto Transport Corp*., 302 NLRB 888 fn. 2 (1991) where it was held that deferral of an alleged 8(a)(5) allegation was inappropriate in light of allegations of 8(a)(3) and independent 8(a)(1) violations.

[14] The Eighth Circuit reversed the Board's decision on the ground that the Board erroneously failed to analyze the case under *United Technologies*, supra. Applying those factors, the Eighth Circuit concluded that deferral was appropriate, and further found the scope of available remedies was relevant but not dispositive. *NLRB v. Ramey Supermarkets*, 55 F.3d 382, 388–389 (8th Cir. 1995).

[15] As noted above, the warning letter expires after a 12-month period. That fact, however, goes to the scope of the remedy for the alleged

With regard to whether the alleged 8(a)(1) statement could or should be subject to deferral, "[t]he Board has consistently held that it will not defer one issue if it is closely related to another issue that is not deferrable." *Clarkson Industries*, supra at 352 (citing *Everlock Fastening Systems*, 308 NLRB 1018 fn. 8 (1992); *15th Avenue Iron Works*, 301 NLRB 878, 879 (1991) enfd. 964 F.2d 1336 (2d Cir. 1992)). Here too, the alleged 8(a)(1) statement arises from the same set of circumstances and is entwined with the Respondent's alleged unlawful failure to rescind the warning letter. To defer this aspect of the complaint to arbitration, therefore, would result in precisely the sort of "piecemeal" approach disfavored by the Board.

In support of its argument for deferral, Respondent cites to *United Technologies Corp.*, supra at 560. There, the Board overruled existing Board precedent and held that it would be appropriate, given certain conditions, to defer alleged violations of Section 8(a)(1) of the Act. It is true, as Respondent contends, that in that case, "the dispute center[ed] on a statement a single foreman made to a single employee and a shop steward . . . " The Board found that the facts of that case made it "eminently well suited for deferral." Id. In *United Technologies*, however, the threat alleged to be violative of Section 8(a)(1) was "clearly cognizable" under the broad grievance-arbitration provisions of the parties' collective-agreement. In the instant case, by contrast, there is no support for the proposition that the grievance-arbitration process could be invoked either to address or to offer a meaningful remedy for the dispute in question. As discussed above, Respondent has predicated its argument for deferral on contractual provisions which may become applicable only should unforeseen events come to pass. And, as noted above, Respondent has consistently taken the position that "stand alone" warning letters are not arbitrable which, in my view, not only fails to evince a willingness to arbitrate the instant dispute but suggests exactly the opposite.[16]

Accordingly, based upon the foregoing, I find that the allegations of the complaint are not suitable for deferral under *Collyer, United Technologies* and their progeny, and will proceed to evaluate the merits of the case.

B. Applicable Legal Principles

Under Section 8(a)(1) of the National Labor Relations Act (the Act), it is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed" by Section 7 of the Act.[17] Section 8(a)(3) provides that it shall be an unfair labor practice for an employer to "discriminate in hiring, or any term of condition of employment, [or] to encourage or discourage membership in a union." Any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, thereby constituting a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 933 (2006).

As noted above, the complaint alleges that Respondent refused to rescind the warning letter issued to Griffin because of the protected conduct of his shop steward.[18] Respondent has asserted that its refusal to rescind the warning letter stemmed, not from Eltzholtz's protected conduct, but from Griffin's insubordination. Thus, under the General Counsel's theory of the case, and Respondent's corresponding defenses to the allegations of the complaint, the reasons for Respondent's actions in disciplining Griffin are in dispute. The General Counsel, in its brief, argues that the instant case should be evaluated under the principles set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Similarly, Respondent argues that under a *Wright Line* analysis, the complaint should be dismissed. Inasmuch as the parties have placed the employer's motivation at issue, I find that an analysis under *Wright Line* is appropriate. In addition, however, because I also have concluded that Griffin's conduct, or alleged misconduct, was intertwined with protected activity, the circumstances of this case render it amenable to analysis under the factors set forth *Atlantic Steel*, 245 NLRB 814 (1979). See *Felix Industries*, 331 NLRB 144, 146 (2000), enf. denied and remanded 251 F.3d 1051(D.C. Cir. 2001), on remand *Felix Industries,* 339 NLRB 195 (2003), as will be discussed below.

C. Application of the Wright Line Standards

In cases which turn on employer motivation, to establish a violation of the Act under Section 8(a)(3) the General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. *Wright Line*, supra; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004); enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). The Board has long held that, where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. See *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003) (citing *La Gloria Oil*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003).

Once the General Counsel has made out the elements of a prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc*., 346 NLRB 494 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. To meet its

unfair labor practices, not to whether the Respondent's conduct was, in fact, violative of the Act in the first instance or whether the contract contemplates a remedy which would meet statutory prerogatives.

[16] I further note that, contrary to Respondent's suggestion, this case does present claims of employer animosity to the employee exercise of rights which are protected under the Act.

[17] Sec. 7 of the Act provides, in relevant part, that "employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[18] The complaint does not allege that the discipline issued to Griffin was due to his own protected conduct.

Wright Line burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co*., 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996).

As noted above, a prerequisite for finding a violation under Section 8(a)(3) of the Act is protected conduct. Here, I find that the General Counsel has established that both Griffin and Eltzholtz were engaged in union activity and conduct otherwise protected under the Act.

The Board historically has held that processing and presenting grievances is concerted activity protected by Section 8(a)(1) and (3) of the Act. *Bowman Transportation, Inc*., 134 NLRB 1419 (1961). This is true even when the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 (1976) (and cases cited therein). The term "grievance," as used in Section 9(a) of the Act, refers "to both disputes over interpretation and application of a collective-bargaining agreement and those matters delimited in Section 9(a) of the Act: rates of pay, wages, hours of employment, or other conditions of employment." *Dow Chemical Co.,* 227 NLRB 1005 (1977). Here, the meetings in question were held pursuant to delineated contractual provisions for the purpose of discussing discipline to be issued to a bargaining unit employee. Clearly, both Eltzholtz and Griffin were thereby engaging in union and concerted, protected activities by virtue of their participation in such meetings.

Moreover, in *Union Fork & Hoe Co*., 241 NLRB 907 (1979), the Board reaffirmed the principle that in presenting and processing grievances shop stewards retain the protection of the Act except for extreme misconduct in the performance of their union duties.

As discussed above, the circumstances which led to the meeting in Celmer's office on February 9 are essentially not in dispute. Griffin was called into the office to discuss and receive a written warning for a discrepancy between a scan audit and his delivery records. It is also essentially undisputed that during the course of this meeting, Eltzholtz, acting in his representational capacity, asked to review the company records and questioned whether such discipline was warranted. It is also not disputed that when Griffin was accused of theft, a dischargeable offense, he became distressed and argumentative and refused to follow Celmer's instructions to step back and sit down. Celmer ended the meeting.

The central feature of the instant dispute concerns what happeded subsequent to this initial meeting. The General Counsel and the Charging Party contend that Celmer refused to rescind Griffin's insubordination warning because of Eltzholtz's protected conduct. Respondent, contends that the reason for the refusal to rescind the warning was due to Griffin's continued insubordinate behavior. In this regard, Respondent relies upon *Tradewaste Incineration*, 336 NLRB 902, 905–906 (2001), where the Board affirmed an administrative law judge's conclusion that a suspension of an employee was not unlawful when it occurred in response to that employee's use of profane language and threatening conduct.[19]

For the reasons discussed below, I find that Eltzholtz' entire course of conduct and, in particular, his intervention during the second meeting, was not only sanctioned by the express terms of the parties' collective-bargaining agreement (as described above) but also continued to warrant the protections of the Act.[20] I further find that the General Counsel has met its burden of showing that this protected conduct was a motivating or substantial factor leading to Respondent's refusal to rescind Griffin's warning for insubordination.

D. Credibility Determinations

Respondent argues that neither Eltzholtz nor Griffin can be credited. With regard to Eltzholtz, Respondent cites to purported discrepancies in his testimony. As Respondent notes, Eltzholtz testified that Celmer, "[B]asically said that I was going to take the warning letter for insubordination, but because he opened his mouth, you're getting it." Respondent further notes that in his pretrial affidavit, Eltzholtz similarly stated that Celmer said, "I was going to take away the letter for insubordination but because he opened his mouth, you still have a warning letter." According to Respondent, the references to "you" and "he" in Eltzholtz' testimony and affidavit demonstrate that Celmer's comment was addressed to Griffin. Respondent then points to the fact that, during his cross examination, Eltzholtz initially testified that Celmer addressed Griffin, but then equivocated on this point, stating that Celmer, ". . . said it to both of us, I guess." Respondent thus challenges the veracity of Eltzholtz' testimony and the reliability of his memory. I find Respondent's arguments in this regard to be unpersuasive. This is nothing more than a minor inconsistency. Moreover, as Respondent apparently concedes, Eltzholtz's testimony was consistent with his pretrial affidavit, and his apparent indecision on cross-examination regarding whether Celmer addressed her comments to Griffin or to both men is insufficient to rebut it. Moreover, Eltzholtz' testimony on this issue generally is consistent with the underlying facts and the inherent probabilities of the situation.

Respondent additionally challenges the notations made in Eltzholtz's notebook on two grounds. One concerns the fact that the first comment attributed to Celmer in conjunction with the February 9 meeting appears in quotation marks, while the second does not. Respondent also contends that a physical examination of the document indicates that Eltzholtz fabricated the second statement, and made the notation after-the-fact, to generate support for the charge.[21] Again, I find these arguments

[19] The events in question in that case occurred when the employee in question went to a supervisor's office to request his personnel file. The administrative law judge concluded that this was not protected conduct because the employee was not asserting a protected right under Section 7 or acting on behalf of others, but was engaging in conduct which was individual in nature which was, further, not a continuation of prior protected conduct.

[20] My analysis of Eltzholtz' conduct is set forth in sec. III. E., below.

[21] In particular, Respondent argues that the second statement attributed to Celmer looks as though it had been written in a narrow space

to be unconvincing. As an initial matter, Eltzholtz credibly explained that he took his notes regarding the second statement made by Celmer in a hurry, as he was exiting the room.[22] This explanation makes sense, and corroborates Eltzholtz' account of events to the extent he testified that the second meeting was of a very brief duration. Moreover, with regard to Eltzholtz' credibility in general, I find that as a long-term employee of the Respondent and the shop steward, he would have no reason to fabricate statements attributable to Celmer, especially where the interaction in question had been witnessed by another manager. Indeed, such falsehoods would surely work against Eltzholtz' interests both as an employee and with regard to the future representation of employees at the facility.[23] I additionally found that, for the most part, Eltzholtz testified in a forthright manner and withstood a vigorous cross-examination by Respondent's counsel.

Respondent challenges Griffin's credibility by noting certain inconsistencies between the record and his pretrial affidavit. Certain of these inconsistencies are inconsequential, such as whether Celmer actually used Eltzholtz' name or referred to him as the shop steward. There are other, more significant inconsistencies which pertain to his accounts of the first and second meetings with Celmer. As Respondent notes, paragraph five of Griffin's pretrial affidavit deals with the second meeting. Nowhere in that paragraph is any discussion of whether Celmer stated anything to Griffin about issuing him a warning letter or not removing a warning letter because of the conduct of the shop steward. Rather, Griffin's references to such statements occur in his description of what occurred subsequently, when he spoke with Celmer at his truck. This is a significant discrepancy from Griffin's testimony at the hearing, to be sure, but based upon my observation of Griffin's testimony and the record as a whole, I do not find it a sufficient basis to discredit Griffin's testimony in its entirety.[24] Griffin explained this omission by contending: "You got to remember, sir, a lot of this stuff is lumped in together, that's what I did." I credit that explanation, because it is consistent with Griffin's demeanor and his manner of testimony generally. Griffin appeared to make an effort to testify truthfully, to the best of his recollection. He, too, was subjected to a rigorous cross-examination and he was respectful and cooperative throughout.

In contrast, I find that Celmer was not a credible witness in many respects. As an initial matter, I fail to credit her testimony regarding the nature and extent of Griffin's alleged insubordinate behavior. By way of example, Celmer testified that after walking out of her office after the first meeting, Griffin proceeded to the belt where his package car was situated, grandstanding for his coworkers in a loud and boisterous manner. It is inherently improbable, in my view, that had Griffin been acting in such an uncontrolled and inappropriate manner, as described by Celmer, that she would have wanted him to return to her small office, where she had previously found his conduct to be intimidating. I additionally find it inherently improbable that Celmer would have then broached the subject of rescinding the warning for insubordination had Griffin been acting in such a fashion.[25] It is far more likely that the level of discipline issued to him would have increased in its severity in such an instance. Further, the warning letter issued to Griffin describes his misconduct as consisting of insubordination and "wagg[ing] [his] finger toward the face of a Manager." There is no reference to grandstanding or loud or boisterous conduct in the presence of other employees, or any other conduct generally disruptive of the work environment, conduct which surely would have been subject to discipline had it occurred. Accordingly, for the above reasons, I fail to credit Celmer's account in this regard.[26]

In the same vein, I do not credit Celmer's version of what transpired once the parties reconvened in her office. Again, there is no specific reference to any misconduct on the part of Griffin, as testified to by Celmer, in the warning letter that was issued to him. In this regard, I note that Matteo acknowledged, contrary to Celmer, that she made an express connection between Griffin's discipline and the activities of his shop steward when she said to Eltzholtz: "If you keep egging him on, I'm going to have to give him a warning letter." This testimony is fundamentally corroborative of that offered by Eltzholtz and Griffin, and is evidence that it was Eltzholtz' advocacy, rather than Griffin's behavior, which prompted Celmer's decision to proceed with the warning for insubordination.

I further credit Griffin's testimony about his subsequent conversation with Celmer at his truck. Again, I find that, as a 20-year employee, it would not be in his interest to fabricate false testimony regarding statements made by his manager.[27] I further note that Griffin's account is at least partially corroborated by Eltzholtz, who witnessed the two speaking, although he did not overhear what was said.

Thus, I find that the General Counsel has established that Eltzholtz's protected conduct in his role as Griffin's shop steward was a substantial or motivating factor in Respondent's determination not to rescind the warning letter issued to Griffin for insubordination. Based upon my assessment of the credibility of the witnesses, coupled with the inherent probabilities of the situation, I find that Respondent has failed to meet its bur-

which was left between Eltzholtz's log entry for February 9 and one for a subsequent meeting with management on February 13.

[22] As Eltzholtz testified: "Probably because I was walking out of the office when I was writing that down, I was just in a hurry, because we were in the office for the second time, 10 to 15 seconds."

[23] The Board has found that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests . . ." *Flexsteel Industries*, 316 NLRB 745 (1995) (citations omitted). See also *Advocate South Suburban Hospital*, 346 NLRB 209, 209 fn. 1 (2006).

[24] See *Gold Circle Department Stores*, 207 NLRB 1005, 1010 fn. 5 (1973).

[25] I additionally note that although Matteo testified that Griffin's voice was "animated," he did not report any disruptive behavior on Griffin's part.

[26] In support of its contentions that Respondent's accounts of Griffin's alleged insubordinate behavior are fabricated, the General Counsel further points to the fact that Celmer did not contact security and that Griffin was allowed to take his truck on the road that day.

[27] As noted above, in Griffin's pretrial affidavit, he discusses this conversation, alleging that Celmer stated to him that "your shop steward got you another warning letter, the one I was going to take away, insubordination."

den of proving by a preponderance of the evidence that it would have issued the warning to Griffin in the absence of Eltzholtz' protected conduct. Thus, under the *Wright Line* analysis urged by both the General Counsel and the Respondent, I find that by failing to rescind Griffin's warning for insubordination, Respondent violated Section 8(a)(1) and (3) of the Act.

E. The Atlantic Steel Criteria

Even if I were to accept the fundamental premise of Respondent's defense, that Griffin was disciplined due to his behavior and not as a result of anything Eltzholtz might have said or done, I would still be constrained to find that Respondent violated the Act. There is no dispute that the warning letter at issue grew out of events at the February 9th meetings with Celmer and Matteo concerning a perceived scanning error, for which Griffin was subject to discipline. As discussed above, I have found that both Eltzholtz and Griffin were engaging in protected conduct during these meetings. Thus, even under Respondent's theory of the case, the imposition of discipline can be found lawful only if Griffin's conduct is found to have lost the protections of the Act. Inasmuch as Respondent has contended that Griffin's conduct was provoked by Eltzholtz, I will undertake an analysis of his conduct under the *Atlantic Steel* criteria, as well.

The Board has long held that, "in the context of protected concerted activity by employees, a certain amount of leeway is allowed in terms of the manner in which they conduct themselves. Although flagrant, opprobrious conduct may sometimes cause an employee's concerted activity to lose the protection of the Act, impropriety alone does not strip concerted conduct of statutory protection." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part 81 F.3d 209 (D. C. Cir. 1996) (footnotes and citations omitted). Here, I find that neither Eltzholtz nor Griffin engaged in conduct which would have caused either of them to lose the protections of the Act or for any such misconduct to have been lawfully imputed to Griffin.

Under *Atlantic Steel*, supra, four factors are analyzed to determine whether conduct has lost the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practices. Addressing the first factor—the place of the discussion—I note that the conduct at issue occurred at a meeting, called by Respondent, in a private office outside the earshot of other employees,[28] to discuss discipline to be issued to a bargaining unit member. Clearly, this meeting was an appropriate forum to discuss, and to dispute, whether such discipline was warranted.

As to the second *Atlantic Steel* factor—the subject matter of the discussion—I find that Eltzholtz was acting squarely within his role as union representative by questioning Celmer about whether Griffin had, in fact, missed a scan; by disputing her suggestion that Griffin had stolen the package, an offense for which he could be discharged; and subsequently by attempting to explain the basis for Griffin's angry reaction to Celmer's accusation, a reaction for which he had been disciplined. Similarly, Griffin's protestations that he had not stolen the package, something he could well have suffered serious discipline for, was protected in this context.

The third *Atlantic Steel* factor concerns the nature of the conduct at the meeting. Addressing the initial meeting, I find that the conduct exhibited by Eltzholtz was neither provocative nor unreasonable and was far within the bounds of conduct which has been sanctioned by the Board as regards shop steward advocacy generally. *Union Fork & Hoe*, supra; see also *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991); *Noble Metal Processing, Inc*., 346 NLRB 795, 800 (2006) (and cases discussed therein). While Griffin admittedly became angry and refused instructions to step back and sit down, the Board has held that "there are certain parameters within which employees may act when engaged in concerted activities." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). In particular, the Board has noted that "disputes over wages, hours and working conditions are among the disputes most likely to engender ill feelings and strong responses." Id. In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has found that a line "is drawn between cases where employees engaged in concerted activities that exceeds the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service." *Prescott Industrial Products Co.*, 205 NLRB 51, 51–52 (1973). Here, I do not believe that Griffin's conduct crossed that line. My conclusions in this regard are buttressed by the undisputed evidence that Celmer considered withdrawing the warning letter for insubordination even *after* this conduct occurred.

With regard to the second meeting, even if I were to credit Celmer that Griffin entered the office, remained agitated, rocked back and forth on his feet and continued to protest that Celmer had called him a liar and a thief, I would not find that this conduct exceeded permissible bounds. In this regard, I note that there is no evidence that Griffin at any time during this encounter made any threatening gestures or directed any profanity or derogatory statements toward Celmer or any other management official. Eltzholtz's statement to Celmer, to the effect that he'd be angry too, if accused of theft, must be considered in context, as he was acting as Griffin's official representative during the meeting. I do not find this statement was insubordinate or that it somehow sanctioned insubordinate behavior on Griffin's part.[29]

Regarding the fourth *Atlantic Steel* factor, whether the conduct at issue was provoked by the Respondent's unfair labor practices, I note that the General Counsel has not alleged that the initial announcement of the warning letter was unlawful. I find therefore that any unfair labor practices here occurred after the fact, as a consequence of Eltzholtz' advocacy, and were not

[28] As noted above, I do not credit Celmer's testimony that Griffin engaged in "grandstanding" or loud, boisterous behavior in the presence of other employees.

[29] In this regard, I additionally note that Respondent has not asserted that Eltzholtz acted in an insubordinate manner during either meeting.

a precipitating factor.

On balance however, the application of the *Atlantic Steel* criteria strongly suggests that neither Eltzholtz nor Griffin lost the protections of the Act by any of their conduct on February 9.

Thus, the very conduct to which Respondent attributes the issuance of Ernest Griffin's warning for insubordination was and remained, in and of itself, protected conduct. Under its own theory of the case, therefore, Respondent's defense to the allegations of the complaint lacks merit.

Based upon the foregoing, I conclude that Respondent's refusal to rescind Griffin's warning letter for insubordination violated Section 8(a)(1) and(3) of the Act.

I further find that Celmer's statement to Griffin that, his receipt of the warning letter for insubordination was because of the activities of his shop steward reasonably tended to coerce, restrain and interfere with Griffin's right to seek union representation and therefore independently violated Section 8(a)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. United Parcel Service, Inc., is an employer engaged in commerce within the meaning of Section 2(2), 2(6), and (7) of the Act.

2. Teamsters Local 177 is a labor organization within the meaning of Section 2(5) of the Act.

3. By stating that a warning letter issued on March 1 to Ernest Griffin would not be rescinded because of the protected conduct of his union representative, Respondent violated Section 8(a)(1) of the Act.

4. By failing and refusing to rescind the warning letter for insubordination issued to Ernest Griffin on March 1, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily disciplined Ernest Griffin must, to the extent it has not already done so, rescind the March 1 warning letter for insubordination, remove all references to such discipline from Griffin's personnel file and notify him in writing that it has done so and that the discipline will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, United Parcel Service, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that discipline will not be rescinded because of the protected conduct of their union representatives.

(b) Disciplining employees because of the protected conduct of their union representatives.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline issued to Ernest Griffin, and within 3 days thereafter notify Griffin in writing that this has been done and that the discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Secaucus, New Jersey, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 9, 2007.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 20, 2008.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees that discipline will not be

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

rescinded because of the protected conduct of their union representatives.

WE WILL NOT discipline or otherwise discriminate against employees because of the protected conduct of representatives of Teamsters Local 177 or any other Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline issued to Ernest Griffin, and WE WILL within 3 days thereafter notify Ernest Griffin in writing that this has been done and that the discipline will not be used against him in any way.

UNITED PARCEL SERVICE, INC.